SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1161

A. L. GARNER, et. al., Petitioners

v.

FIRST AMERICAN LIFE INSURANCE COMPANY, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN OPPOSITION

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Certiorari should be denied.

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OCTOBER TERM, 1970

No. 1161

A. L. GARNER, et. al.,

Petitioners

v.

FIRST AMERICAN LIFE INSURANCE COMPANY,

Respondent.

On Petition For a Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals vacating the order of the District Court and remanding the cause for further proceedings is printed in the Appendix to the Petition at page A-4 and reported at 430 F.2d 1093. The order of the District Court is printed in the Appendix to the Petition at page A-1 and reported at 290 F. Supp. 1018.

JURISDICTION

The judgment of the Court of Appeals was filed on August 31, 1970. A timely Petition for Rehearing was denied without opinion on September 29, 1970, and the Petition for a Writ of Certiorari was filed on December 23, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTEREST OF THE AMICUS

The American Bar Association ("ABA") sought leave to file a brief amicus curiae in the Court of Appeals in order to bring to the attention of that Court the probable effect of the decision of the District Court upon the practice of law both within and without the Fifth Circuit and the detrimental effect of the District Court decision upon the public interest. Leave having been granted, the ABA filed a brief and subsequently presented oral argument. This Brief in Opposition is filed with the written consent of petitioners and respondent to express the position of the ABA that certiorari should be denied.

QUESTIONS PRESENTED FOR REVIEW

1. Whether stockholders of a corporation engaged in litigation against the corporation, its officers and directors, must establish good cause in order to compel disclosure during pre-trial discovery of confidential communications between the corporation and its attorneys.

2. Whether a corporation may assert the attorney-client privilege to protect confidential communications between the corporation and its attorneys against compulsory disclosure in litigation commenced by parties who are not stockholders of the corporation.

STATEMENT OF THE CASE

The decision below was rendered in an appeal under 28 U.S.C. § 1292(b) from an order of the United States District Court for the Northern District of Alabama, Southern Division, holding that the attorney-client privilege was "not available" to a corporation in litigation commenced against the corporation by stockholders.

The Court of Appeals reversed the order of the District Court and remanded the cause for further proceedings, stating that:

> "The attorney-client privilege still has viability for the corporate client. The corporation is not barred from asserting it merely because those demanding information enjoy the status of stockholders. But where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance." (Appendix A-22, 430 F.2d at 1103-04; footnote omitted.)

The civil action in which the issue arose was commenced by stockholders of First American Life Insurance Company ("First American"), an Alabama corporation, against the corporation, its officers and directors, for alleged violations of federal and state securities acts and under state law for fraud. Claims were asserted both directly for an award of damages to the stockholders and derivatively for damages to the corporation.

The pre-trial discovery proceedings which resulted in the order of the District Court involved attempts by the plaintiffs to obtain discovery of confidential communications between the corporation and attorneys for the corpo-

ration, both by production of documents and by questions asked during a deposition on oral examination of an attorney for the corporation. Examples of the questions to which the plaintiffs sought to compel answers are as follows:

> "(4) 'Q. Did you express an opinion to the company that, in view of the SVC's question of the transaction, that you would have to modify the opinion as expressed in Plaintiffs' Exhibit 5?'"
>
> • • • • •
>
> "(9) 'Q. I'm asking for your opinion, based upon facts which you knew in March of 1966 or statements of facts or reports of reported facts that had come to your attention as of that date.'"

Counsel representing the corporation in the discovery proceedings, who was not the counsel involved in the confidential communications sought to be discovered, invoked the attorney-client privilege of the corporation.

In the District Court the plaintiffs did not question the availability of the attorney-client privilege as to parties other than stockholders with respect to the communications which they sought to discover. Instead, the plaintiffs took the position, as stated in their Motion to Compel Answers, that:

> "they are stockholders of First American Life Insurance Company, and that there is no privilege as against plaintiffs with respect to communications between First American Life Insurance Company and any of its counsel."

The District Court held that the attorney-client privilege was "not available as against plaintiff stockholders," citing an English case decided in 1888 and another English

case decided in 1943. The court later supplemented its order with language permitting an immediate appeal under 28 U.S.C. § 1292(b).

Prior to any proceedings in the Court of Appeals, an equity proceeding commenced in the appropriate state court by the Alabama Superintendent of Insurance resulted in the appointment of a "Judicial Agent" to take possession of the assets of First American and operate its business, express authority being also granted to the Agent to defend the litigation commenced by the instant plaintiffs. In the Court of Appeals, counsel for the Judicial Agent sought reversal of the order of the District Court and noted that First American, under the control of the Agent, had asserted claims against former officers and directors of the corporation which were similar to the claims asserted by the instant plaintiffs.

Counsel for the American Bar Association filed a motion for leave to file a brief *amicus curiae* with the Court of Appeals stating that:

> "The order of the court below does not discuss the effect of such a decision upon the legal profession, the interests of clients of the legal profession and the public interest, but instead relies upon two English cases, both of which are based largely upon an obsolete analysis of stockholders' property rights.
>
> "The American Bar Association, as the most broadly representative professional association of lawyers within the United States, seeks leave to file a brief amicus curiae in order to bring to the attention of this Court the probable effect of the decision below upon the practice of law both within and without this Circuit and the detrimental effect of the decision below upon the public interest."

The brief filed on behalf of the ABA urged reversal on the ground that the public interest in effective legal

representation which requires an attorney-client privilege also requires that the privilege extend to communications between corporations and their attorneys without compulsory disclosure to complaining stockholders.

Counsel for the plaintiffs responded in their brief to the ABA position by suggesting that "any legitimate corporate interest in non-disclosure of communications with the corporation's attorneys can be protected by requiring the showing of good cause" (Argument Heading B., Reply Brief for Appellants-Petitioners and Cross-Appellees, A. L. Garner, et al., p. 11). After referring specifically to the ABA brief, the plaintiffs replied:

> "Implicit in this argument is the suggestion that if the decision of the lower court is sustained in this case, then a corporation's management will not feel free to consult fully and frankly with the corporation's attorneys because of the fear of some future, baseless stockholder suit.
>
> "The short answer to this contention is that the courts can adequately protect the corporation in situations where a stockholder-plaintiff fails to show good cause for the production of communications with counsel." (*Ibid.*)

The Court of Appeals, summarizing its holding in the language quoted in full at page 3 above, held that a corporation was not barred from asserting the attorney-client privilege merely because those demanding information are stockholders, but that the availability of the privilege was subject in such cases "to the right of the stockholders to show cause why it should not be invoked in the particular instance," and listed "many indicia that may contribute to a decision of presence or absence of good cause." The order of the District Court was vacated and the cause remanded for further proceedings

ARGUMENT

I. The Court should defer review of any questions raised by the requirement that a stockholder show good cause to obtain discovery of attorney-client communications.

Four of the six numbered Questions for Review in the Petition (pp. 2-3) challenge that portion of the decision of the Court of Appeals which holds that stockholder plaintiffs have the burden to establish "good cause" for disclosure of confidential communications otherwise protected by the attorney-client privilege. Those questions refer primarily to purported difficulties in the application of the requirement of good cause to particular cases. Both the requirement of good cause and the assignment to the stockholder plaintiffs of the burden of establishing that requirement were suggested below by the instant petitioners as an appropriate means to limit the impact of disclosure on the interests sought to be fostered by the attorney-client privilege. (Reply Brief, p. 11, quoted above at p. 6). Petitioners' present position that review should be allowed principally on questions arising from the requirement of good cause is accordingly less than persuasive.

Even if petitioners had consistently opposed the requirement of good cause, review of that portion of the decision below should not be granted in the instant case.

First, the instant case is particularly inappropriate to test any difficulties of administration which may be created by the requirement of good cause. If petitioners' are correct that the evidence already developed in the instant case confirms their allegations "concerning payoffs to state officials" and other similar conduct (Petition, pp. 6-7), the District Court should have little difficulty in determining whether the instant plaintiffs have carried their burden. Under such circumstances a party might well be entitled to disclosure under the usual exception to the

attorney-client privilege for communications "about a crime or fraud to be committed," *United States v. Bob*, 106 F.2d 37, 40 (2d Cir.), *cert. denied*, 308 U.S. 589 (1939), citing *The Queen v. Cox*, 14 Q.B.D. 153 (1884), regardless of his status as a stockholder.[1]

Second, a determination of the general question of whether the requirement of good cause will impose "undue burdens on the federal courts" (Petition, p. 10) might more appropriately occur after one or more federal courts have attempted to apply the rule to particular facts. A consistent and firm administration of the requirement of good cause may tend to eliminate many of the concerns which caused the amicus to support an outright reversal of the decision of the District Court and the application to stockholder litigation of the same attorney-client privilege available to a corporation in litigation with parties who are not stockholders, subject also to the same exceptions. An erratic administration of the requirement of good cause, on the other hand, might gravely interfere with the counseling relationship between corporations and their attorneys and suggest the adoption by this Court of a more restrictive rule.

There is no present conflict of appellate decisions which requires resolution by this Court. The cases cited in the Petition (pp. 15-16) were each decided by a District Court either without opinion or with a short opinion relying on the decision by the District Court in the instant case. Most of those cases involve either the same alleged conspiracy and some of the same parties as the instant case, *e.g.*, *Fischer v. Wolfinbarger*, 45 F.R.D. 510 (W.D. Ky. 1968), or the same counsel who represent the plaintiffs

[1] Petitioners asserted below that they had established good cause for the production of documents as required by former Fed. R. Civ. P. 34, prior to the amendment of March 30, 1970, 398 U.S. 997, although no language relevant to that issue appears in the order of the District Court. Petitioners appear to agree with the understanding of the amicus that the "good cause" required to be shown by the Court of Appeals to avoid the attorney-client privilege, pursuant to the indicia described by the Court of Appeals, is not similar to the good cause formerly required by Rule 34.

in the instant case, *e.g.*, *Dahlke* v. *Morrison*, CCH Fed. Sec. L. Rep. ¶ 92,490 (N.D. Ala. Oct. 3, 1969), and the appearance of a substantial body of precedent on this point is largely illusory.

Third, the appointment of a Judicial Agent, in effect a receiver, for respondent First American, and the Agent's subsequent assertion of claims against the former officers and directors of First American, also renders the instant case less appropriate for review. The financial resources ordinarily available to a viable corporation to resist the plaintiffs' position on the merits are not available to the instant respondent, a corporation alleged by petitioners to be insolvent. The corporation's interest in preventing disclosure of the communications sought by the plaintiffs is certainly less substantial in the instant case than in the typical case in which a corporation is attempting to defend the correctness of the actions taken by its officers and directors, rather than asserting claims against those parties.

The appointment of the Judicial Agent has also removed from the instant case the question of whether the officers and directors of a corporation should be allowed to invoke the attorney-client privilege if they are themselves subject to suit, or whether the corporation should be represented for those purposes "by a neutral party . . . ." as suggested in Burnham, "The Attorney-Client Privilege in the Corporate Arena," 24 Bus. Lawyer 901, 911 (1969). The respondent is now in the control of a court-appointed Agent who has ratified the corporation's assertion of the attorney-client privilege.

The amicus agrees with petitioners that the matters decided below are of great importance to the administration of justice and to the legal profession. The very importance of these matters suggests to the amicus, however, that this Court should grant review in a more appropriate and typical case, and after the lower courts in the

Fifth Circuit and elsewhere have accumulated experience in the administration of the requirement of good cause, rather than in the instant case.

II. The decision below is correct in holding that a corporation is not barred from invoking the attorney-client privilege merely because those seeking information are stockholders.

The Court of Appeals correctly held that mere ownership of stock in a defendant corporation does not entitle a plaintiff to obtain disclosure of the corporation's attorney-client communications. Petitioners position in this Court that their stock ownership should automatically entitle them to such disclosure cannot be sustained and is not a sufficient ground on which to grant review.

Unless a corporation is to be denied any attorney-client privilege whatsoever (as also urged by the petitioners), some procedure must exist to determine in a particular case whether the interest of the plaintiff stockholder in disclosure should overcome the interest in effective legal representation which is the origin of the attorney-client privilege. Petitioners' argument to the contrary appears to assume that the interests of a single stockholder plaintiff are always identical with the interests of the corporation. The Court of Appeals explicitly recognized that such an identity of interests might not exist even if the only interests to be accorded legal recognition are the interests of the stockholders, since the interests of nonparty stockholders

> "may be affected by impinging on the privilege, sometimes injuriously (though not necessarily so—in some situations shareholders who are not plaintiffs may benefit). The corporation is vulnerable to suit by shareholders whose interests or intention may be inconsistent with those of other shareholders, even others consisting a majority" (A-[illegible] n.17, 430 F.2d at 1101 n.17).

The interests of the stockholders, moreover, are not the only interests which should be accorded legal recognition on this issue—there may in addition be interests of employees, general creditors, policyholders (in the case of the respondent insurance company), and others in contractual relationships with the corporation, which interests may be different from or contrary to the interests of the particular stockholder or stockholders who have brought suit against the corporation, and which interests may be affected in particular cases by a forced disclosure of otherwise confidential attorney-client communications.[8]

The opinion of the Court of Appeals not only shows a thorough consideration of these various interests but also establishes a sound procedure by which conflicts between them may be resolved.

III. The decision below is correct in holding that a corporation is a client for the purpose of invoking the attorney-client privilege.

Petitioners seek to reverse the holding below that a corporation is a client which may invoke the attorney-client privilege "in view of" a recent decision holding that a corporation may not invoke the constitutional privilege against self-incrimination.

But that decision, *George Campbell Printing Corp.* v. *Reid*, 392 U.S. 286, 288, does not change the prior law on self-incrimination. At least since *Hale* v. *Henkel*, 201 U.S. 43, 74-75, cited in the *George Campbell* decision, 392 U.S. at 289, a corporation has not been entitled to claim the federal constitutional privilege against self-incrimination.

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[8] Even the English *nisi prius* decision on which petitioners principally rely, and in which the plaintiff was "the holder of nearly one-half the capital," *Gouraud* v. *Edison Gower Bell Telephone Co.*, 57 L.T. Ch. 498, 59 L.T. 813, 814 (1888), recognized that the court must reserve the power to refuse disclosure:

> "of course, if the plaintiff's *bona fides* were in any way impeached, and the object of the inspection were to trump up a case, the court might, in the exercise of its discretion, refuse inspection." (Emphasis in the original.)

The modern rationale of the distinction in this respect between a corporation and other organizations, on the one hand, and a natural person on the other hand, was stated in *United States v. White*, 322 U.S. 694, 698-99, in which the privilege against self-incrimination was held not applicable to a labor union:

> "The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals . . . It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided.
>
> • • • • •
>
> "Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation."

The reasons for the attorney-client privilege, however, apply equally to organizations, including corporations, and to natural persons. The modern policy which supports the attorney-client privilege is stated in 8 Wigmore, Evidence § 2291, p. 545 (McNaughton rev. 1961):

> "In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent."

No argument is necessary to establish that organizations of many types, including corporations, must and should obtain legal advice.

Decisions by this Court have used substantially the same language in supporting the availability of the priv-

ilege for both natural persons and corporations. Compare *Connecticut Mutual Life Ins. Co.* v. *Schaefer*, 94 U.S. 457, involving a natural person,[3] with *United States* v. *Louisville & Nashville R.R.*, 236 U.S. 318, involving a corporation.[4]

The same argument by analogy to the privilege against self-incrimination now advanced by petitioners was also made to the Court of Appeals in *Radiant Burners, Inc.* v. *American Gas Ass'n*, 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963), which concluded that the analogy was not proper because of the different reasons for the two privileges:

> "the attorney-client privilege derives from a regard for the *rights of a client, personal or impersonal* in character, fostering a social policy concerned with facilitating the working of justice." 320 F.2d at 322-23. (Emphasis added.)

Nor does the instant case offer an opportunity to resolve the issues presented by *Decker* v. *Harper & Row Publishers, Inc.*, 423 F.2d 487 (7th Cir.), *cert. granted*, 397 U.S. 1073 (1970), *aff'd by an evenly divided Court*, 91 S. Ct. 351 (Jan. 12, 1971), other than by the Draconian solution of totally eliminating the attorney-client privilege for corporations and other impersonal entities. At no point in the proceedings below did any party or the amicus or

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[3] "If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. *It would be a prohibition upon professional advice and assistance.*" 94 U.S. at 457. (Emphasis added.)

[4] "The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, *such enactment would be a practical prohibition upon professional advice and assistance.*" 236 U.S. at 336. (Emphasis added.)

the Court of Appeals make "any distinction between the client's communications to the attorney and the attorney's communications to the client" (A-6 n.7, 320 F.2d at 1096 n.7), or any distinction involving the status within the corporation of the persons who had made and received the communications to and from the attorneys. The "control group" issue argued in the *Decker* case is therefore not presented in the instant case.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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